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In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-224

JAMES E. ZIMMERMAN, ELNORA M. ZIMMERMAN,
Petitioners,

VS.

DAIL EBER, NICK STIPA,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

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OPINION BELOW

The opinion delivered in the court below will not be published in the official reports, but is appended to the Petition for Writ of Certiorari. The opinion was delivered on April 25, 1977, Opinion No. 75-1645, Motion for Rehearing denied on May 20, 1977.

JURISDICTION

Petitioners apparently seek a review of the opinion of the United States Court of Appeals, Tenth Circuit, under United States Supreme Court Rule 19(b), 28 U.S.C., which

states that the following reason among others will be considered in granting writs of certiorari:

> "(b) Where a court of appeals . . . has decided an important state or territorial question in a way in conflict with applicable state or territorial law . . ."

The statute in question is K.S.A. 22-2404(3), the Kansas Fresh Pursuit Statute, set forth in the Petition for Writ of Certiorari.

Respondents submit that this Court has no jurisdiction to review this matter because contrary to Petitioners' statements and belief, the United States Court of Appeals, Tenth Circuit, did not construe, interpret or decide the Kansas statute in question in any manner whatsoever, much less in a manner contradictory to applicable state law. It merely affirmed the ruling of the trial court that the statute had no application to the case. The opinion further affirmed a jury verdict for Respondents who were being sued by Petitioners for damages for personal injuries.

STATEMENT OF THE CASE

Petitioners' statement of the case is incorrect in that it reflects at page 3, that Petitioners were arrested for violations of Missouri state law. This is not completely accurate. The record which was before the Court of Appeals, discloses the Petitioners were, in fact, arrested by Kansas City, *Kansas* police officers and that the Respondents signed *Kansas* complaints against the Petitioners, not only for speeding and drunken driving (which occurred in both the states of Kansas and Missouri) but also for assault and disorderly conduct *which occurred only in the State of Kansas*. (R. 114, 115, 130, 119, 165) These facts were duly noted in the opinion of the Court of Appeals.

ARGUMENT

This case was essentially a fact case, and as in every fact case, there was evidence to support a verdict for either the Petitioners or the Respondents. Therefore, Respondents do not take issue with Petitioners' assertion that the opinion of the United States Court of Appeals, Tenth Circuit, states that the record supports a finding that Petitioners were arrested by Respondents prior to the arrival of the Kansas police.

Respondents do, however, challenge the Petitioners' method of presentation of such statement and call to the attention of this Court the fact that by italicizing certain words from the opinion of the Court of Appeals as follows:

> ". . . the record *supports* a finding that the *defendants arrested plaintiffs* before arrival of the Kansas officers . . ." (Writ, p. 6)

Petitioners would lead this Court to believe that the Circuit Court emphasized such italicized words, when in fact it did not. When the opinion is read as written, it is evident that the Circuit Court was commenting on the trial court's supplemental instruction—which it held was proper—that there was evidence that the Respondents had arrested the Petitioners before the arrival of the Kansas officers *and* there was evidence to the contrary, but that such evidence was not material to the issue of whether or not the trial court's instruction was clearly erroneous.

Petitioners completely disregard the applicable principles of review that the evidence is to be viewed and construed favorably to the prevailing party below, and all reasonable inferences of which the evidence is fairly susceptible should be drawn in support of, and not against the judgment rendered below.

There is more than ample evidence in the record to support the jury's verdict in favor of Respondents. Therefore, this court, as is the case with every court of review, will adhere to a rule of noninterference where the jury verdict depends upon an appreciation of facts and circumstances which admit of different interpretations. (*Story Parchment Co.* v. *Paterson Parchment Paper Co.*, 282 U.S. 555, 51 S.Ct. 248, 75 L.Ed. 544 [1930]; *Myers* v. *Pittsburgh Coal Co.*, 233 U.S. 184, 34 S.Ct. 559, 58 L.Ed. 906 [1914]).

Furthermore, the jury returned a general verdict in favor of the Respondents and against Petitioners. It is a well-established rule of law that a general verdict for a defendant, without special questions, resolves all controverted questions of fact against the plaintiff. (*Roach* v. *Hulings*, 16 Pet. 319, 41 U.S. 319, 10 L.Ed. 979 (1842); *Erie R. Co.* v. *Schleenbaker*, 257 F. 667 (6th Cir. 1919), *cert. den.*, 250 U.S. 666, 40 S.Ct. 13, 63 L.Ed. 1197 (1919); *Bank of America National Trust & Savings Assoc.* v. *Hayden*, 231 F.2d 595 (9th Cir. 1956); *Dickins* v. *International Brotherhood, etc.*, 171 F.2d 21 [D.C. Cir. 1948]).

Inherent in the jury's verdict in the instant case was a finding that Petitioners were not arrested by the Respondents; or if they were, the arrest was not for violations of Missouri law, but for violations of Kansas law. In either event, the Kansas Fresh Pursuit Statute, K.S.A. 22-2404 (the explanation of which by the trial court the Petitioners charge as error) had no application whatsoever to this case. The trial court so found and the Circuit Court of Appeals affirmed.

It is settled law that in federal courts, the judge, in submitting a case to the jury may, at his discretion, whenever he thinks it necessary to assist the jury in arriving at a just conclusion, comment upon the evidence, call their attention to parts of it which he thinks important, and

express his opinion upon the facts, provided all matters of fact are ultimately submitted to the determination of the jury. *United States* v. *Murdock*, 290 U.S. 389, 54 S.Ct. 223 78 L.Ed. 381 (1933); *Simmons* v. *United States*, 142 U.S. 148, 12 S.Ct. 171, 35 L.Ed. 968 (1891).

The prerogative of the federal trial judge to comment on the evidence has been articulated in *Quercia* v. *United States*, 289 U.S. 466, 53 S.Ct. 698, 77 L.Ed. 1321, 1334 (1933) where Mr. Chief Justice Hughes speaking for the Court said:

> "In a trial by jury in a federal court, the judge is not a mere moderator, but is the governor of the trial for the purpose of assuring its proper conduct and of determining questions of law. . . . In charging the jury, the trial judge is not limited to instructions of an abstract sort. It is within his province, whenever he thinks it necessary, to assist the jury in arriving at a just conclusion by explaining and commenting upon the evidence, by drawing their attention to the parts of it which he thinks important; and he may express his opinion upon the facts, provided he makes it clear to the jury that all matters of fact are submitted to their determination. . . ."

Petitioners contend that the trial court's supplemental instruction on the Kansas Fresh Pursuit Statute was improper and that:

> "The trial court's instruction should have propounded only the elements relevant to the definition of an arrest as a matter of law therefor, allowing the jury to determine whether the Missouri Police Officers had in fact conducted themselves in such a manner as to require that they bring Petitioners before a Magistrate." (Writ, p. 4)

Respondents submit that this is precisely what the trial court did, for in response to the following question by the jury during deliberations:

> "Was false arrest not being brought before the Judge or Magistrate the responsibility of the Kansas City, Kansas Police Department or the two defendants?" (R. 206)

the trial court instructed the jury that it was the jury's duty to determine the matter of false arrest, the ultimate issue in the case.

In the Writ, Petitioners have included only a fragmentary portion of the instruction in question. It is basic law that an appellate court will review instructions only if the complete instruction is in the record. Furthermore, a reading of the entire supplemental instruction of the court will demonstrate that contrary to Petitioners' charges, the trial court did, in fact, define the term "arrest" as a matter of law. The meaning of the term was defined in the court's original instructions as well as in the supplemental instruction, which, in its entirety, reads as follows:

> "THE COURT: In connection with your question: 'Was false arrest (not being brought before a Judge or Magistrate) be the responsibility of the Kansas City, Kansas police department or the two defendants?' As I told you, the term, 'false imprisonment,' is the restraint of the personal freedom of an individual without legal excuse by any word, act, threat or personal violence, that, under the circumstances the one being restrained fears to disregard.
>
> "And I told you that a law enforcement officer may arrest a person when he has probable cause to believe that a person is committing or has committed a misdemeanor and the law enforcement officer has

> probable cause to believe that one, such person will not be apprehended or evidence of the crime will be irretrievably lost unless such person is immediately arrested, or two, such person may cause such injury to himself, or others or damage to property unless immediately arrested, or any crime has been or is being committed by such person in his view.
>
> "Now, in connection with the Statute which I read to you, and what I read to you was a portion of the Statute also, that any law enforcement officer of another state who enters this State in fresh pursuit and continues within this State in fresh pursuit of a person in order to arrest him on the ground that he has committed a crime in the other state has the same authority to arrest and hold such person in custody as law enforcement officers of this state have to arrest and hold a person in custody.
>
> "The other section which I read to you: If an arrest is made in this state by a law enforcement officer of another state in accordance with the provisions of this section he shall, without unnecessary delay take a person arrested before a Magistrate of the County in which the arrest is made. Such Magistrate shall conduct a hearing for the purpose of determining the lawfulness of the arrest. If the Magistrate determines that the arrest was lawful, he shall commit the person arrested to await for a reasonable time the issuance of an extradition warrant by the Governor of this State, or the waiver thereof, or shall permit such person to go at large upon giving an appearance bond, with or without surety. If the Magistrate determines that the arrest was unlawful, he shall order the discharge of the person arrested.

"Now, *the factual question which you have* would be what the people were charged with by the defendants in this case. They were charged by the Kansas —by these defendants in Kansas of violating the Kansas laws and therefore the responsibility of taking them before a Magistrate would only be under this statute if they were to be extradited, in other words, taken back to Missouri for—in this instance to be prosecuted for a Missouri offense. So *if there was a responsibility under the law, and I only go to the responsibility, not the false arrest part, the false arrest, if you find from the facts that they were arrested in Kansas by these defendants* at the time they were apprehended first, before the Kansas policemen got there, then, of course, *you would determine* whether or not these ofifcers had probable cause to believe these people were committing an offense. The responsibility to take them before a Magistrate, if any existed under the circumstances of this case, as a matter of law, in my opinion, rested with the Kansas City Police Department and not the defendants. *I doubt if the law is applicable, but because it was in the exhibit I felt I had to explain it to you.*" (Emphasis added)

The trial court instructed the jury, as a matter of law, that the statute in question did not apply to the facts. The Court of Appeals held the instruction was proper and in the circumstances the statute did not apply. Since the statute was not relevant to the issues, Petitioners cannot now complain that they were prejudiced by the trial court's comments, particularly in view of the fact that, as observed by the Court of Appeals, Petitioners actually benefited from the instruction.

CONCLUSION

It is respectfully submitted that Petitioners have wholly failed to sustain their burden of establishing, under Rule 19, why the Writ should be granted. The decision below involved no federal law. In this case the Court of Appeals neither construed nor interpreted any statute of the State of Kansas. Therefore, it could not have interpreted the statute in question in any manner conflicting with applicable decisions of the Kansas Supreme Court. The Court of Appeals correctly held that the rulings of the trial court were not clearly erroneous, and there is substantial competent evidence to support the jury's verdict, so as to obviate the necessity for any interference by this Court with the verdict of the jury.

Respectfuly submitted,

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